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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.

and

NATURAL RESOURCES DEFENSE COUNCIL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICUS CURIAE ROLLINS ENVIRONMENTAL SERVICES (NJ) INC.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 7

THE AUTHORIZATION OF PRIVATE PROSECUTION FOR CIVIL PENALTIES UNDER THE CLEAN WATER ACT VIOLATES THE CONSTITUTION'S SEPARATION OF POWERS 7

A. The Authority To Prosecute For Civil Penalties That The Clean Water Act Grants To Private Citizens Is A Function The Constitution Assigns Exclusively To The Executive 7

1. Civil Enforcement Of Federal Law Is The Quintessential Executive Function 8

2. Private Prosecutions For Civil Penalties Under The Clean Water Act Constitute Civil Enforcement Of Federal Law 9

3. Displacement Of The Executive's Prosecutorial Discretion In And Of Itself Constitutes An Impermissible Infringement On Its Authority To Enforce Federal Laws 11

4. Private Prosecutions Under The Act Have The Effect Of Overriding The Executive's Exercise Of Prosecutorial Discretion 13

B. Authorizing Private Citizens To Prosecute For Civil Penalties Violates The Appointments Clause Because Congress Can Assign This Executive Function Only to Presidential Appointees 18

TABLE OF CONTENTS—Continued

Page

1. The Executive's Authority Under The Appointments Clause To Select Officers To Perform Executive Functions Has Been Interpreted Strictly 20

2. Congress' Authorization Of Federal Enforcement Authority Being Carried Out By Private Citizens, Like Its Selection Of Specific Individuals, Encroaches Impermissibly On The Executive's Appointments Power..... 22

3. Subjective Considerations, Such As Extent Of Encroachment And Putative Improvements In Government Efficiency, Are Not Relevant 25

4. Congress' Otherwise Broad Powers Are Circumscribed So That Its Role In Designating Federal Law Enforcers To Act On The Public's Behalf Is Limited To Choosing Among Executive Officers 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES: Page

American Petroleum Institute v. EPA, 661 F.2d 340 (5th Cir. 1981) 5, 13
Bowsher v. Synar, —— U.S. ——, 106 S.Ct. 3181 (1986) 5, 7, 21, 23, 26, 28, 29
Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*
Chesapeake Bay Foundation v. Bethlehem Steel Corp., 608 F. Supp. 440 (D. Md. 1985) 9, 24, 29
Chesapeake Bay Foundation v. Bethlehem Steel, Civ. No. Y-84-1620 (D. Md., January 30, 1987) .. 23
Commodity Futures Trading Commission v. Schor, —— U.S. ——, 106 S.Ct. 3245 (1986) 24
Confiscation Cases, 74 U.S. 454 (1869) 8, 17
Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81 (2d Cir. 1972) 29
CPC International, Inc. v. Train, 540 F.2d 1329 (8th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977) 13
Davis v. Passman, 442 U.S. 228 (1979) 22, 23, 24, 29
First National Bank v. United Air Lines, 342 U.S. 396 (1952) 2
FMC Corp. v. Train, 539 F.2d 973 (4th Cir. 1976) 5, 13
Hamker v. Diamond Shamrock Chemical Co., 756 F.2d 392 (5th Cir. 1985) 1
Heckler v. Chaney, 470 U.S. 821 (1985) 11, 12, 13
Huntington v. Attrill, 146 U.S. 657 (1892) 9
Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1982) 7, 17, 19, 26, 27, 29
Industrial Union Department v. American Petroleum Institute, 448 U.S. 607 (1980) 28
In re: Application of President's Commission On Organized Crime, Subpoena of Scaduto, 763 F.2d 1191 (11th Cir. 1985) 28
In Re: President's Commission on Organized Crime, Subpoena of Scarfo, No. 85-5539 (3d Cir. Feb. 29, 1985) 28
Jacklovich v. Interlake, Inc., 458 F.2d 923 (7th Cir. 1972) 29

TABLE OF AUTHORITIES—Continued

	Page
J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928)	7, 28
Kalaris v. Donovan, 697 F.2d 376 (D.C. Cir.), *cert. denied*, 462 U.S. 1119 (1983)	28
Marathon Oil Company v. EPA, 564 F.2d 1253 (9th Cir. 1977)	13
Melcher v. Federal Open Market Committee, 644 F. Supp. 510 (D.D.C. 1986)	21, 23
Middlesex County Sewerage Authority v. National Sea Clammers' Association, 453 U.S. 1 (1981)	10
Myers v. United States, 272 U.S. 52 (1926)	8, 18, 19
Nathan v. Smith, 737 F.2d 1069 (D.C. Cir. 1984)	12
Nixon v. Administrator of General Services, 433 U.S. 425 (1977)	7, 28
Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982)	7, 19, 24, 25
Sierra Club v. Aluminum Co. of America, 585 F. Supp. 842 (N.D.N.Y. 1984)	9
SPIRG v. Monsanto Co., 600 F. Supp. 1474 (D.N.J. 1985)	23, 24
Springer v. Philippine Islands, 277 U.S. 189 (1928)	8, 21
Synar v. United States, 626 F. Supp. 1374 (D.D.C. 1986) (three judge panel), *aff'd sub nom. Bowsher v. Synar*, —— U.S. ——, 106 S.Ct. 3181 (1986)	7
United States v. Cox, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965)	11
United States ex. rel. Marcus v. Hess, 317 U.S. 537 (1943)	29
United States v. Nixon, 418 U.S. 683 (1974)	11
Weyerhaeuser Co. v. Costle, 590 F.2d 1011 (D.C. Cir. 1978)	13

STATUTES AND REGULATIONS:

Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*	*passim*
Clean Air Act, 42 U.S.C. § 7604(a)	17

TABLE OF AUTHORITIES—Continued

	Page
Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901, 6925	17
Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601	17
Clayton Act, 15 U.S.C. § 13	10
False Claims Act, 31 U.S.C. § 3729	29
Federal Trade Commission Act, 15 U.S.C. §§ 41, *et seq.*	10
Sherman Act, 15 U.S.C. § 21	10

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BRIEF OF AMICUS CURIAE ROLLINS ENVIRONMENTAL SERVICES (NJ) INC.

INTERESTS OF AMICUS CURIAE

Pursuant to Rule 36 of the Rules of the Supreme Court,[1] the *Amicus Curiae*, Rollins Environmental Services (NJ) Inc., files this brief in support of petitioner, Gwaltney of Smithfield, Ltd. *Amicus Curiae* adopts and supports petitioner's argument for reversal of the decision below on grounds that private prosecutions under the Clean Water Act may not be brought to seek civil penalties for purely past violations, as the Fifth Circuit held in *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985). This brief is submitted to supplement that argument by bringing to the Court's

[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court.

attention serious questions about the constitutionality of the statutory authority at issue. Since acceptance of petitioner's argument would obviate the need to address those questions in this case,[2] *Amicus Curiae* does not request that the Court rule on them at this time. It merely wishes to urge that the Court not preclude a full consideration of the authority's constitutionality in deciding the statutory construction question that is presented.[3]

Rollins Environmental Services (NJ) Inc. ("Rollins"), the owner and operator of a commercial hazardous waste treatment facility in Bridgeport, New Jersey, is a defendant in *NJPIRG v. Rollins Environmental Services (NJ) Inc.*, Civil Action No. 86-3438. *NJPIRG* is a private prosecution now pending before the District Court for the District of New Jersey in which civil penalties are sought under the same section of the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.* (the "Clean Water Act" or the "Act") as the one this Court is asked

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[2] Respondents sought in this case the recovery of penalties for purely past violations. Thus, a decision of this Court to find such violations not punishable under the private prosecution authority would moot the constitutional questions raised. However, despite such a ruling, in other factual circumstances where the Clean Water Act problems at issue had not already been completely resolved, the private prosecution authority would be available for citizen-initiation of actions for civil penalties, and the constitutional infirmities would be equally evident and serious. A decision in this case that purely past violations are not within the scope of the authority would thus simply postpone the day that such infirmities need be addressed.

[3] In urging the Court's cognizance of our views, we would note Mr. Justice Jackson's observation that "sometimes the path that we are beating out by our travel is more important to the future wayfarer than the place we choose to lodge." *First National Bank v. United Airlines*, 342 U.S. 396, 398 (1952) (concurring opinion). Drawing upon this metaphor, we in part urge the contrary: namely, that the place the Court here "chooses to lodge" is indeed quite important. However, we at the same time respectfully urge that the Court's decision do nothing to impede those on different journeys in traveling "the path that we are beating out" in this brief.

to construe in this case (§ 505). Plaintiffs in that action, Public Interest Research Group of New Jersey, Inc. ("NJPIRG") and Friends of the Earth, have filed notice that they will move jointly in *NJPIRG* for partial summary judgment. In their complaint, plaintiffs seek, among other relief, civil penalties for past violations as respondents did in this case. Thus, the decision of this Court will ineluctably be a major factor in determining the extent to which *Amicus Curiae* may be liable in *NJPIRG* for civil penalties.

Rollins in *NJPIRG* has challenged the constitutionality of the Clean Water Act's private prosecution authority under which massive civil penalties may be imposed—the authority also at issue here—as a violation of the Constitution's separation of powers. Accordingly, Rollins respectfully submits that crucial to the Court's informed review of the issues raised in this case is the presentation of the analysis upon which its constitutional challenge is based.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents' prosecution of petitioner under the Clean Water Act resulted in the imposition of civil penalties of some $1.3 million under the Act's private prosecution authority. As interpreted by the courts below, that authority is identical in all substantive respects to that which the Act also delegates to the Executive Branch. Congress' establishment of such an independent private scheme for prosecuting alleged violators of federal law conflicts with the Constitution's grant of powers to the Executive. Under Article II, the prosecution of civil actions to enforce federal law and the exercise of prosecutorial discretion with respect to the pursuit of such actions are within the exclusive purview of the Executive Branch. Since Congress can assign such executive functions only to Presidential appointees, the Act's authorizing of private citizens to prosecute for civil penalties violates the separation of powers mandate of the Constitution.

Prior to enactment of this far-reaching authority in 1972, Congress had apparently never previously authorized such private prosecution in any other statute.[4] Although it was little used for about a decade, this authority increasingly has been invoked around the country in recent years—so much so that by 1983 private citizens initiated more prosecutions under the Clean Water Act than did federal enforcement officials.

The constitutional prerogatives that this private prosecutorial authority conflicts with are the Executive's duty to "take Care that the Laws be faithfully executed," and the concomitant privilege—also provided for under Article II—to appoint officers to execute federal law. Enforcement of federal laws for protection of the public interest is among the most basic of the functions the Constitution bestows upon the Executive. Equally indisputable is the corollary principle apposite to this challenge—namely, that prosecution for civil penalties payable to the federal Treasury is a central part of the Executive's civil enforcement jurisdiction. Indeed, lawsuits seeking civil penalties have been a favored avenue of the federal government for prosecuting violations of the wide range of congressionally-mandated regulatory requirements.

Congress unquestionably has a substantial role in regulating the execution of federal law, but the Constitution carefully circumscribes that role in major respects—as becomes apparent upon reviewing pertinent separation of powers decisions of this Court. Among Congress' powers are the right to establish whatever limitations on execution it deems appropriate and are otherwise constitutional; it also may hold oversight hearings with respect

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[4] The *qui tam* authority provided for in a few statutes—which has been suggested as a possible precedent—is not analogous to the private prosecution authority in the Clean Water Act and subsequent environmental statutes. *See* p. 29, n.23, *infra*.

to the administration and enforcement of federal law; it may even authorize private individuals to bring actions to seek damages or injunctive relief that may incidentally, and possibly significantly, benefit the public interest.

What Congress cannot do is delegate the "execution of federal law"—such as enforcement of federal statutes on behalf of the broader public interest—to persons other than Officers of the United States appointed by the President. *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). *Buckley* leaves no doubt that this is an inviolable separation of powers principle. *Id.* Furthermore, in the wake of *Bowsher v. Synar*, —— U.S. ——, 106 S.Ct. 3181 (1986), even where the President initially appoints an official authorized to execute federal law, Congress cannot control the removal of the official. Thus, in determining who is to be responsible for the execution of laws on behalf of the public, Congress is limited to deciding *which executive officials* are to perform such functions.

The Constitution's establishment of this fundamental precept is not just an exercise in formalism, as is well demonstrated in the context at issue. In establishing clean water restrictions, the federal Environmental Protection Agency ("EPA") has set limits at levels that are not expected to be met 100% of the time. *See e.g. FMC Corp. v. Train*, 539 F.2d 973, 985-86 (4th Cir. 1976); *American Petroleum Institute v. EPA*, 661 F.2d 340, 351 (5th Cir. 1981). Congress, though, has authorized identical civil penalty requirements in the Clean Water Act for all violations—without regard to magnitude or consistency with initial permit assumptions. Thus, substantial executive discretion is of necessity implicitly sanctioned, both in deciding whether to bring lawsuits and in determining amounts of penalties sought. The government's exercise of this broad discretion has been accomplished, in part, through EPA's use of an elaborate enforcement policy that takes into account a vast array of factors.

In contrast to this measured approach to enforcement, respondents and other private groups routinely decide to bring lawsuits simply because a report submitted by an industrial facility to EPA or a state agency shows required permit limits to have been exceeded, even though further investigation might show that the violations at issue may have been contemplated at the time the limit was established, or that no enforcement action might be appropriate under the federal enforcement policy. The presence of these mitigating circumstances notwithstanding, the interpretation given by the courts below to the private prosecution authority, which has the effect of sanctioning prosecution of *any* violations for civil penalties, allows respondents and others to obtain settlements providing for sizable payments to private groups they choose to designate—even though private damages or other private payments clearly are not authorized, only civil penalties payable to the federal Treasury.

Regardless of whether or not private citizens carry out their prosecutorial role under the Act in a reasonable manner, though, their intervention will in every event act to displace the Executive's exercise of prosecutorial discretion, which has long been recognized as an integral part of its power to enforce the law. Given the broad range of factors that must be taken into account in deciding whether and how to proceed in addressing apparent Clean Water Act violations, the constitutional guarantee that such discretion must reside only with the Executive merely confirms the soundness of the Constitution's framework.

Buckley v. Valeo, the seminal ruling of the Court that is relevant here, appears moreover to stand as a clear precedent in support of the conclusion that the Act's private prosecution authority to seek civil penalties should be found unconstitutional. There, the Court held that, under the Appointments Clause, similar civil enforcement authority under the federal elections law could only be carried out by persons appointed by the President.

ARGUMENT

THE AUTHORIZATION OF PRIVATE PROSECUTION FOR CIVIL PENALTIES UNDER THE CLEAN WATER ACT VIOLATES THE CONSTITUTION'S SEPARATION OF POWERS.

A. The Authority To Prosecute For Civil Penalties That The Clean Water Act Grants To Private Citizens Is A Function The Constitution Assigns Exclusively To The Executive.

Article II of the Constitution vests the President with the power and duty to "take Care that the Laws be faithfully executed. . . ." Art. II, § 3.[5] Each Branch is to "exercise one of the governmental powers recognized by the Framers as inherently distinct." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60 (1982); *see also J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928). As Mr. Chief Justice Burger stated in his dissenting opinion in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), the separation of powers is "in no sense a formalism. It is the characteristic that distinguished our Constitution."[6] *Id.* at 506.

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[5] The Executive's responsibilities were separated from those of the Legislature based upon the philosophy that "[w]hen the Legislative and Executive powers are united in the same person or body, . . . there can be no liberty, because apprehensions may arise lest *the same* Monarch or Senate should *enact* tyrannical laws to *execute* them in a tyrannical manner." The Federalist No. 47 (J. Madison) (Cook ed.) (emphasis in original). The Framers also had "the profound conviction . . . that the powers conferred on Congress were the powers to be most carefully circumscribed." *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 947 (1982). Accordingly, the Constitution makes the Executive "separate and wholly independent" from the Legislative Branch. *Bowsher v. Synar*, 106 S.Ct. 3181, 3186 (1986).

[6] The court in *Synar v. United States*, 626 F. Supp. 1374 (D.D.C. 1986) (three judge panel), *aff'd sub. nom. Bowsher v. Synar*, —— U.S. ——, 106 S.Ct. 3181 (1986), recently discussed the Framers' approach to limiting government through the separation of powers:

> Mid-twentieth century Americans have become accustomed to assuming that the central constitutional method of protecting

1. *Civil Enforcement Of Federal Law Is The Quintessential Executive Function.*

Of the functions the Constitution delegates to the Executive, none is more fundamental than the duty to enforce federal laws such as the Clean Water Act so as to protect the public interest. *See, e.g., Myers v. United States*, 272 U.S. 52, 117 (1926). Moreover, as this Court stated in *Buckley v. Valeo*, "[a] lawsuit is the ultimate remedy for a breach of the law, and it is to the President . . . that the Constitution entrusts" the carrying out of that responsibility. 424 U.S. at 138.

The Court made a similarly definitive statement more than a century before:

> [I]t is clear that all [civil litigation] so far as the interests of the United States are concerned, are subject to the direction, and within the control of, the Attorney-General.

Confiscation Cases, 74 U.S. 454, 458-459 (1869). The Court later was equally unequivocal in *Springer v. Philippine Islands* in stating that "[l]egislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions." 277 U.S. 189, 202 (1928).

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individual freedoms from being overridden by government ukase is to prevent governmental intrusions into certain defined zones of individual conduct. Thus, we quite rightly applaud actions enshrining constitutional rights to freedom of speech, religion, privacy, and equal protection.

Those who wrote the Constitution, however, did not employ this technique. Rather, they emphasized the virtues of limiting governmental power and then dividing the remaining power among autonomous government compartments. Hence, most of our constitutional rights of individual liberty or autonomy are stated in constitutional amendments. The body of the Constitution as originally written is principally an exercise in applying the concepts of federalism and separation of powers.

Id. at 1403-1404, *quoting* Krattenmaker, "Article III and Judicial Independence, Why the New Bankruptcy Courts are Unconstitutional," 70 Geo. L.J. 297, 301-302 (1981).

2. *Private Prosecutions For Civil Penalties Under The Clean Water Act Constitute Civil Enforcement Of Federal Law.*

The private civil prosecution authority under the Clean Water Act, as interpreted by the courts below, is coextensive in every detail with that of the federal government—with the single proviso that if the government itself has already initiated civil or criminal action, private prosecution cannot additionally be pursued. In fact, private citizens stand squarely in the federal government's shoes in prosecuting these punitive actions,[7] with the full panoply of civil enforcement powers available to be exercised. *See Sierra Club v. Aluminum Co. of America*, 585 F. Supp. 842, 853 (N.D.N.Y. 1984); *Chesapeake Bay Foundation v. Bethlehem Steel Corp.*, 608 F. Supp. 440, 449 (D.Md. 1985) (citizens "seek the enforcement of federal law"). Wielding the government's broad discretion is allowed, moreover, in whatever way the private prosecutor deems appropriate.

The breadth of the Act's authorization for private citizens to bring civil punitive actions could hardly be greater. Prosecution is authorized for *any alleged viola-*

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[7] Prosecutions that seek the imposition of penalties are recognized to be punitive, and for the benefit of the public as a whole. Additionally, they are clearly distinguishable from actions that are remedial in nature. In *Huntington v. Attrill*, 146 U.S. 657, 13 S.Ct. 224 (1892), this Court stated:

> In the municipal law of England and America, the words "penal" and "penalty" have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws. . . .
>
> Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal. . . .
>
> The test whether the law is penal in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual. . . .

13 S.Ct. at 227-228 (citations omitted).

tion of the major federal water pollution clean-up requirements. Civil penalties up to $25,000.00 per day per violation—the same penalties authorized in prosecutions by the federal government—can be sought in federal district court by anyone meeting a minimal standing requirement.

Furthermore, private prosecutions for civil penalties under the Clean Water Act are intended to punish violators in the same way as governmental prosecution. Protection of private rights is not their purpose at all. Indeed, as this Court has confirmed, Congress specifically rejected the establishment of a private right for damages. *Middlesex County Sewerage Authority v. National Sea Clammers Assoc.*, 453 U.S. 1, 21-22 (1981).

Congressional intent not to authorize the traditional "private attorney general' action under the Clean Water Act is thus unambiguous. Moreover, a review of federal statutes providing for that form of action, such as the antitrust statutes, highlights the existence of major differences between grants of such authority and the private prosecution authority challenged here. For example, section 4 of the Clayton Act authorizes "[a]ny person injured in his business or property . . . to recover damages." 15 U.S.C. § 15. Enforcement on behalf of the public interest (as opposed to such private remedial actions) is, by contrast, vested in federal agencies.[8]

Though the private remedy the antitrust laws authorize (which includes authority for an award of treble damages) additionally serves a public purpose in deterring antitrust violations, the relief clearly has the primary objective of remedying private injury. *See generally*, L. Sullivan, *Handbook of the Law of Antitrust* 769-774, 785 (1977); P. Areeda & D. Turner, 2 *Antitrust Law* § 331 (1978). Private prosecutions for civil

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[8] *See, e.g.*, 15 U.S.C. § 41, *et seq.* (Federal Trade Commission Act); 15 U.S.C. § 13 (Clayton Act § 2, authorizing Federal Trade Commission prosecution of actions for price discrimination); and 15 U.S.C. § 21 (Sherman Act § 4, delegating enforcement to various agencies).

penalties to enforce the Clean Water Act, on the other hand, seek the imposition of punitive measures to vindicate wrongs against the public. Thus, they are only superficially analogous to, and easily distinguishable from, private attorney general actions authorized under other laws.

3. *Displacement Of The Executive's Prosecutorial Discretion In And Of Itself Constitutes An Impermissible Infringement On Its Authority To Enforce Federal Laws.*

The Executive's exercise of prosecutorial discretion in determining whether and how to proceed is a major element of its authority to enforce federal law. By authorizing private citizens to supplant federal enforcers in making complex civil penalty prosecution decisions, the Clean Water Act thus not only permits significant encroachment upon the Executive's authority to initiate lawsuits, it also seriously undermines the concomitant prerogative of law enforcement—prosecutorial discretion.

That such discretion is entrusted to the Executive and generally not even reviewable by the courts is clear. "[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965) (as "an incident of separation of powers," courts are not to interfere with prosecutorial discretion). And this key component of executive authority is authorized in enforcement of all laws, not merely criminal statutes. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

As the Court stated in *Heckler v. Chaney* in a factual context that involved civil enforcement of a federal statute,

> This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal

> process, is a decision generally committed to an agency's absolute discretion. (Citations omitted.)
>
> . . .
>
> [W]e recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the executive who is charged by the Constitution to "take care that the Laws be faithfully executed." U.S. Const., Art. II, § 3.

Id. at 831-832. The Court there elaborated further on this "presumption of unreviewability of decisions not to enforce," indicating that the presumption could be overcome if Congress expressly gave courts the authority to intervene or it otherwise acted to regulate agency action. However, nowhere is there any suggestion that granting private citizens the unfettered, standardless right to override the Executive's exercise of prosecutorial discretion would be permissible. *Id.*

The Court also pointed in *Buckley v. Valeo* to "[t]he Commission's enforcement power, *exemplified by its discretionary power to seek judicial relief*," 424 U.S. at 138 (emphasis added), as an important executive function exclusively assigned "to the President." Similarly, in holding that prosecutorial discretion resides solely with the Executive, the D.C. Circuit Court of Appeals recently stated, "[i]f the execution of the laws is lodged by the Constitution in the President, that execution may not be divided up into segments. . . . It is all the law enforcement authority and it all belongs to the Executive." *Nathan v. Smith*, 737 F.2d 1069, 1079 (D.C. Cir. 1984). The D.C. Circuit further pointed out that Congress' undertaking "to control the law enforcement power of the President" by giving "courts authority to issue appropriate orders . . . at the behest of private persons" would, "[o]n the face of the Constitution, . . . be a highly dubious attempt." *Id.* at 1078.

4. *Private Prosecutions Under The Act Have The Effect Of Overriding The Executive's Exercise Of Prosecutorial Discretion.*

The need to exercise prosecutorial discretion in deciding whether and how to respond to any violation is endemic in view of the way that Clean Water Act permits are developed and the range of enforcement alternatives that are available. Since, as noted *supra*, permit limitations are not expected to be achievable at all times, both EPA and the federal courts have recognized that the exercise of enforcement discretion is an inherently necessary element of the regulatory program under the Act. *See Weyerhaeuser Company v. Costle*, 590 F.2d 1011, 1057 (D.C. Cir. 1978); *CPC International, Inc. v. Train*, 540 F.2d 1329, 1338 (8th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977); *see also FMC Corporation v. Train*, 539 F.2d 973, 986 (4th Cir. 1976) (holding that EPA must provide protection against liability where permit exceedances may result from exceptional incidents beyond the reasonable control of a permittee); *American Petroleum Institute v. EPA*, 661 F.2d 340, 350-52 (5th Cir. 1981); *Marathon Oil Company v. EPA*, 564 F.2d 1253, 1272-1273 (9th Cir. 1977). EPA's assertion of its authority to exercise enforcement discretion also is consistent with prosecutorial discretion having been found to be within the authority of other Officers of the United States. *See Heckler v. Chaney*, 470 U.S. at 831-832.

Enforcement decisions in response to violations of Clean Water Act permit restrictions involve the exercise of prosecutorial discretion in at least four different contexts. First, the Agency must determine whether the violation warrants any response at all. Second, it must determine what type of response is warranted. Third, if the Agency decides to initiate prosecution and pursue penalties, it must determine the magnitude of penalties that should be sought. And fourth, if prosecution is brought, the government must make all the decisions requisite to prosecuting and concluding such actions.

To assist it in exercising the requisite discretion, the Agency has developed a definition of significant noncompliance which considers the number and magnitude of violations in determining whether any enforcement response at all is appropriate. In those situations where EPA decides a response is warranted, the Agency must then proceed to consider what type of response is appropriate. Such enforcement may be either informal or formal. If formal enforcement is to be pursued, EPA has three mechanisms from which it can choose. It may issue an administrative order requiring the discharger to take certain action to come into compliance within a specified time period; it may pursue, under recently enacted amendments to the Act, administrative civil penalties for violations; or it may prosecute the violations in federal court.

Determining the appropriate course to follow thus involves the exercise of significant prosecutorial discretion, with EPA required to make case-by-case evaluations taking into account a variety of highly subjective considerations. EPA's clear decision to give enforcement priority to taking steps to bring facilities into compliance, rather than pursuing civil penalties, is evident from statistics that compare the number of administrative orders issued to the number of referrals to the Department of Justice for civil prosecution. In 1983, for instance, EPA made 56 such referrals under the Clean Water Act, while it issued 781 administrative orders.

For those limited cases where EPA decides to prosecute alleged violations, the Agency must decide what amount of penalties should be sought. Although the statute provides for potentially massive penalties (up to $25,000 per day per violation now, after being increased from $10,000 per day earlier this year by Congress), EPA has developed a complex penalty policy to estimate appropriate penalties for varying circumstances. Under this policy, the Agency evaluates both the gravity of the violation and the economic benefit that the discharger

has received by failing to meet the terms of its permit. Depending upon the facts at issue, this element of enforcement discretion can lead to EPA's making significantly different penalty demands.

Finally, once prosecutions are initiated, decisions must be made at every step regarding whether prosecution continues to be justified, how it should be pursued, and whether settlement alternatives are appropriate to protect the public interest. Thus, continually making difficult judgments and exercising broad prosecutorial discretion are inherent in such prosecutions.

The process that EPA utilizes is in stark contrast to the one private groups employ in their Clean Water Act prosecutions. The citizens' groups start at the same point as EPA and state agencies, by reviewing discharge monitoring reports ("DMR's")—reports that EPA requires industrial facilities to submit—to determine whether there are any violations. However, subsequent to that point, the groups' responses vary dramatically from those of regulatory agencies. Often, the groups have no knowledge of the facility, its history, the basis for the permit limits, the attempts the facility has made to achieve compliance, or the gravity of the harm that may have been caused by the violations. Thus, they cannot and do not exercise informed prosecutorial discretion in determining whether violations are significant and whether they require further action.

It also seems clear that their motivations for bringing such actions are in many cases not the same as those of EPA or state agencies.[9] While governmental prosecutions

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[9] To understand additionally why private prosecutions are so different from federal or state enforcement actions, one must further review the actual process utilized by plaintiffs and their attorneys in specific actions. Typically, these cases do not grow out of individual citizens' concerns that a facility in their vicinity may be affecting them and interfering with their enjoyment of the nearby waters. Instead, in recent years they have resulted primarily from a well-orchestrated effort on the part of a small number of law firms and

have focused, as noted above, primarily on achieving compliance, private prosecutions have been directed more at obtaining monetary penalties. Numerous such lawsuits have been brought in situations where facilities are no longer violating their permits; where they have ceased to operate altogether; or where facilities are no longer operating under permits because they have become connected to municipal treatment systems.

In seeking penalties, private prosecutors thus obviously are motivated differently than governmental agencies. Yet, in contrast with private attorney generals, they cannot properly be motivated by self-interest. However, the record of private prosecutors making settlements conditional on payments being made to private groups,[10] rather than the federal Treasury, shows the conflicts that in fact have arisen in private prosecutions. Indeed, a significant level of conflict is inherent by virtue of the

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national environmental groups to investigate DMRs in EPA and state files and to identify major dischargers with significant numbers of purported violations. This investigation is often undertaken by the attorneys under a general retainer agreement. Once the attorneys complete their very narrow investigation, they then recommend those dischargers against whom they feel prosecutions should be brought. The recommendations are submitted to the plaintiff organizations which basically rubber stamp them and authorize their attorneys to proceed. The lawyers then serve the 60-day notice required by the Act and proceed to file a complaint if an "adequate" settlement offer is not made by the potential defendant. The lawyers, if *NJPIRG, supra*, is representative, pursue settlement discussions without any involvement of their clients.

[10] The retainer agreement for example, between plaintiffs in *NJPIRG, supra*, and their attorneys contemplated that settlement amounts would be paid to private groups rather than to the federal Treasury, as the law requires. Consistent with this intent, a survey of 13 settlements in private prosecutions brought in 1983 shows virtually all to have been settled through payments being made to various private groups. In the sample reviewed, the settlement amounts paid to such groups totalled in excess of $500,000. Private prosecutions typically seek civil penalties at the outset, but settlements later reached provide for payment to private groups.

private lawyers' desire to achieve settlements that, at a minimum, provide for payment of their attorneys' fees.[11]

The unfairness resulting from enforcement of the Act's requirements without the Executive's control, and/or despite the intentional exercise of prosecutorial discretion, is far from an academic issue. In *NJPIRG*, *supra*, for example, both EPA and New Jersey reviewed various problems Rollins experienced in meeting its permit limitations. Both authorities then exercised their discretion not to take judicial enforcement action despite extensive knowledge about the problems. The authorities' considered judgment notwithstanding, private citizens are still permitted under the Act to intervene and override the experts' opinion.

In sum, the Clean Water Act slices off from the Executive a discretion-laden portion of its responsibility enforcing key federal requirements—authority of a kind apparently never previously granted in any other statute.[12] By so doing, Congress acted in clear contravention of the Constitution's exclusive vesting in the Executive of the power to vindicate public rights by filing lawsuits, *Confiscation Cases*, 74 U.S. at 458-459.[13]

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[11] Settlements reached in the private prosecutions described in n.10 *supra*, provided for payment of attorneys' fees that were almost four times the amount of penalties payable to the federal Treasury.

[12] Earlier grants of authority to private citizens in environmental statutes had merely authorized the bringing of suits for injunctive relief. *See e.g.*, Clean Air Act, 42 U.S.C. § 7604(a). More recently, though, the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901, 6925, and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, [206] (as amended), have incorporated private prosecution provisions similar to that of the Clean Water Act.

[13] In fact, the appointment of unnamed private citizens to exercise executive enforcement authority raises a significant set of constitutional concerns in addition to those posed in prior cases by Congress' vesting of executive authority in its own officers, because citizen prosecutors are not under the control of any branch of government. Congress' establishment of the one-House veto in *Chadha*

B. Authorizing Private Citizens To Prosecute For Civil Penalties Violates The Appointments Clause Because Congress Can Assign This Executive Function Only To Presidential Appointees.

In accord with their intention to establish an independent Executive Branch, the Framers recognized that the power and duty to faithfully execute the laws must be accompanied by the Executive's right to choose subordinate officers to carry out that responsibility.

> The vesting of the Executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that *as part of his executive power he should select those who were to act for him under his direction in the execution of the laws.*

Buckley, 424 U.S. at 135-136 (emphasis added), *quoting Myers v. United States*, 272 U.S. at 117. Express provision for such selection by the Executive is made in the Appointments Clause in Article II:

> [The President] shall nominate, and by and with the advice and consent of the Senate shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Art. II, § 2, Cl. 2.

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raised the problem of the exercise of unchecked power by a House of Congress and was objectionable on that ground, *inter alia*. 462 U.S. at 966 (Powell, J., concurring). The exercise of enforcement authority and prosecutorial discretion by private citizens under the Act is, by comparison, even less circumscribed by internal substantive constraints than was the one-House veto.

The Framers conceived the checks and balances implicit in the separation of powers as a "self-executing safeguard against the encroachment or aggrandizement of one Branch at the expense of the other." *Buckley*, 424 U.S. at 122. These express constraints have been held to be an absolute bar to infringement unless affirmatively superseded by other provisions of the Constitution.[14] *See e.g.*, *Chadha*, 462 U.S. at 955-956; *Buckley*, 424 U.S. at 127; *Myers v. United States*, 272 U.S. at 116.

The proscribed congressional "encroachment" or "aggrandizement"—that this Court has found unconstitutional so far—has been manifested in three principal ways: through the elimination of a constitutionally-authorized role of another Branch, *Chadha*, *supra*; through provision for the Legislative Branch's involvement in appointment or removal of individuals to carry out executive functions, *Buckley*, *supra*; and through the vesting of another Branch's powers in individuals who, although chosen without congressional involvement, are still not within the class of persons authorized under the Constitution to carry out such powers, *Northern Pipeline Construction Co.*, 458 U.S. at 87. Each of these types of encroachment arguably is involved in Congress' authorization of private citizens prosecuting Clean Water Act violations.[15]

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[14] The Framers also envisioned that only through specific authorization in the Constitution itself may one Branch have a "*partial agency* in" or "*control* over" the actions of another. The Federalist No. 47 (J. Madison) (Cooke ed.) (emphasis in original).

[15] Under part A, *supra*, the grant of prosecution authority to private citizens was shown to eliminate the Executive's role in federal enforcement with respect to violations prosecuted in private actions for civil penalties. Similar to the situation that arose with respect to the legislative veto in *Chadha*, Congress has authorized a mechanism in the Act under which the Executive's exclusive role also has been eliminated with respect to certain decisions in clear conflict with an express constitutional grant of authority.

1. *The Executive's Authority Under The Appointments Clause To Select Officers To Perform Executive Functions Has Been Interpreted Strictly.*

Congress' violation of the Constitution through its establishment of the Clean Water Act private prosecution authority becomes most evident in reviewing decisions of this Court addressing the Executive's power to appoint and control persons authorized to carry out executive functions. As noted previously, *Buckley v. Valeo* is the seminal decision that addresses this exclusive appointment authority of the Executive.

In *Buckley*, the Court overturned Congress' retention of a role for itself in selecting officers charged with the performance of executive authority similar to that involved here. There, the functions at issue were to be exercised by the Federal Election Commission, a majority of whose voting members Congress had selected. Among the Commission's powers was the authority to take enforcement action under the federal elections statute and regulations, including the initiation of civil suits.[16]

After reviewing the responsibilities of the Commisson, this Court concluded that none of the Commissioners' basic functions "operates merely in aid of congressional authority to legislate or is sufficiently removed from the administration and enforcement of public laws to allow it to be performed by the present Commission." *Id.* at 141. The Court held that "[t]hese administrative functions may . . . be exercised *only by persons who are 'officers of the United States.'*" *Id.* (emphasis added). The Court stated further that "[u]nless their selection is elsewhere provided for, *all* Officers of the United States are to be appointed in accordance with the [Appoint-

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[16] The Court particularly emphasized the impermissibility of the Commission carrying out civil enforcement responsibilities. Yet, the largest civil penalty paid under the federal elections law has been $190,000—a review of Commission files through 1986 indicates. By contrast, amounts imposed in specific private prosecutions under the Clean Water Act in recent years have been in excess of $1,000,000, as occurred in this case.

ments] Clause." *Id.* at 132 (emphasis in original). Since certain members of the Commission had not been appointed by the President, the Court ruled that most of the powers of the Commission could not be exercised by the Commission as it was then constituted.[17] *Id.* at 143.

This Court recently confirmed the Executive's prerogatives with respect to officials who conduct executive functions in *Bowsher v. Synar*, *supra*, a separation of powers challenge to the Balanced Budget and Emergency Deficit Control Act of 1985 (the Gramm-Rudman-Hollings Act). There, the Court invalidated a key statutory provision on grounds that it vested executive authority in the Comptroller General, an officer removable by Congress. The Court stated that "[t]he structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess." *Id.* at 5067. *See also Springer v. Philippine Islands*, 277 U.S. at 202 (not having the power of appointment, the legislature cannot vest executive duties in a legislative office).

In sum, *Buckley* and *Bowsher* expressly establish the principle that Congress can vest executive power only in Officers of the United States appointed by the President. Under the Necessary and Proper Clause, Congress can establish the means for implementing statutes, but its "power under that Clause is inevitably bounded by the

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[17] In *Melcher v. Federal Open Market Committee*, 644 F. Supp. 510 (D.D.C. 1986), the federal district court reviewed a challenge which alleged that Congress had vested the exercise of executive authority in the Federal Open Market Committee of the Federal Reserve, a body composed of private individuals appointed by Federal Reserve banks. The Committee's powers revolved around open market trading of government securities in the domestic market as an element of the Federal Reserve's function of promoting national economic goals. The court found that the Committee's activities need not be carried out exclusively by Presidential appointees. *Id.* at 523. However, the court pointedly noted that the Committee was not responsible for enforcing the law, thereby implying that the result might have been different if that had been the case. *Id.*, fn. 26.

express language of the Appointments Clause." *Buckley*, 424 U.S. at 138-139.

2. *Congress' Authorization Of Federal Enforcement Authority Being Carried Out By Private Citizens, Like Its Selection Of Specific Individuals, Encroaches Impermissibly On The Executive's Appointments Power.*

This Court's interpretations of the Appointments Clause that are relevant here have so far been exclusively in the context of Congress' granting authority to persons it selects or controls; however, the Court's rulings enunciate principles that are not restricted to circumstances involving such congressional "aggrandizement" at the expense of the Executive. That the Court has never been presented with a single opportunity to reach a decision in a precisely analogous context is hardly surprising in view of the unprecedented nature of Congress' authorizing private citizens to initiate prosecution for civil penalties, and in doing so, thereby displacing, and in many cases overriding, the Executive's prosecutorial discretion.

By reviewing *Buckley*, together with prior decisions involving Congress' authority to determine who may enforce federal law, the broader applicability of the underlying principle in *Buckley* that limits enforcement responsibilities on behalf of the public to only Presidential appointees becomes readily apparent. For example, in *Davis v. Passman*, 442 U.S. 228 (1979)—which involved Congress' creation of a private right of action, not an authorization for private citizens to prosecute federal law violations in actions seeking punitive relief—this Court stated, "[s]tatutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition, who may enforce them and in what manner." *Id.* at 242. If read out of context, this language would appear to conflict with *Buckley* and later decisions, which make clear that certain categories of persons clearly *cannot* be given executive powers. However, recognizing

the principle enunciated in *Buckley* as a constraint on the broad language in *Davis v. Passman*, any apparent inconsistency is eliminated and the ultimate governing doctrine becomes clear: Congress can determine who is to "enforce" the law, but it must delegate to Presidential appointees the authority to perform the civil enforcement powers of the federal government. The Legislature's powers are unconstrained in making such determinations only in authorizing private rights of action.

Recently, though, in *Chesapeake Bay Foundation, Inc. v. Bethlehem Steel Corp.*, Civil Action No. Y-84-1620 (D. Md. January 30, 1987), the district court found that the broad language in *Buckley* and *Bowsher* expressing the principle that only "Officers of the United States" may carry out executive functions is valid solely in the context where Congress has retained for itself a role in the selection or control of officers who perform such functions. The district court noted that the Court in those cases had emphasized the impermissibility of such congressional "aggrandizement", slip. op. at 4-5. However, it failed to point out that those cases only involved congressional aggrandizement. Nor did it discuss this Court's never having had an occasion to consider the constitutionality of a congressional grant to private citizens of prosecution authority that permits them to override the Executive's prosecutorial discretion.

The district court in *Bethlehem Steel* curiously found no need to limit the principles of *Davis v. Passman*, *supra*, to the facts presented, as it did with *Buckley* and *Bowsher*.[18] In quoting *Davis*, as the district court had done in *SPIRG v. Monsanto Co.*, 600 F. Supp. 1474

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[18] Similar selectivity in application of principles of other decisions is seen in the district court's reference to the statement in *Federal Open Market Committee*, *supra* n.17, to the effect that *Buckley* and *Bowsher* involved Congress' aggrandizement of its own role. However, the district court failed to point out that *Federal Open Market Committee* specifically noted that delegation of federal law enforcement to private individuals was not at issue there.

(D.N.J. 1985),[19] the court made no reference whatever to the fact that the *Davis* decision only addressed Congress' establishment of a private right of action.

In decisions involving the Judicial Branch, this Court has made clear, though, that the Constitution's constraints on congressional encroachment of another Branch's authority are not limited to situations where Congress' aggrandizement of its role is at issue. In *Northern Pipeline, supra*, the Court in considering an intrusion analogous to that presented here held that judges who are removable otherwise than as provided under Article III could not be granted constitutionally-established federal judicial authority, even though Congress had no control over the judicial selection or removal process. At issue there was Congress' vesting of authority to adjudicate bankruptcy cases in non-Article III judges. The Court held that Congress had "impermissibly removed . . . essential attributes of the judicial power from the Art. III district court, and ha[d] vested those attributes in a non-Art. III adjunct." 458 U.S. at 87. The Court concluded that Congress thus had exceeded its constitutional authority and impermissibly encroached upon the authority of the Judiciary.[20] Simi-

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[19] The *Monsanto* court also rejected a constitutional challenge to the private prosecution provision of the Clean Water Act. The court there also reached conclusions concerning the applicability of the separation of powers mandate to the Act's private prosecution authority which are not supportable under Article II and pertinent decisions of this Court. Defendant there, though, failed to cite *Buckley* and the other relevant separation of powers precedents. Thus, the court was not presented with an argument addressing, and in turn failed to recognize, the distinction between congressional delegation of *its own legislative authority* and congressional delegation of the Executive's *federal enforcement authority*. The *Monsanto* court's reasoning is flawed in ways similar to that in the *Bethlehem Steel* decision, and its conclusion that "Congress may vest enforcement power on whomever it pleases," 600 F. Supp. at 1478, is clearly not sustainable under the Appointments Clause as construed by this Court.

[20] In *Commodity Futures Trading Commission v. Schor*, —— U.S. ——, 106 S. Ct. 3245 (1986), this Court recognized that certain

larly, but seemingly even more objectionably, Congress' violation of the separation of powers doctrine here results from removing "essential attributes" of the Executive's enforcement authority by delegating it to unspecified private citizens—individuals who unlike the judges subjected to review in *Northern Pipeline* are not in the first instance selected by the Executive.

3. *Subjective Considerations, Such As Extent Of Encroachment And Putative Improvements In Government Efficiency, Are Not Relevant.*

In overturning congressional infringements of executive authority on separation of powers grounds, this Court has not looked to the extent of the alleged encroachment, or even to whether government efficiency would be enhanced, in reaching its judgment as to constitutionality. The Court's approach instead has been straightforward: If the function to be carried out is an executive function—an inquiry which this Court has reviewed carefully, and which unquestionably has been shown to be the case here—Congress must delegate implementation to one or more Presidential appointees.[21]

The extent of encroachment on the Executive's enforcement authority through actual private prosecutions, although substantial in recent years, has in fact varied

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limited encroachments on the judiciary's role are permissible, particularly where the parties waive their rights to adjudication by Article III courts. As in *Northern Pipeline*, the Court pointed out that it would look to whether "essential attributes" of the judiciary's role had been removed. Since the rights to be adjudicated were not provided for under the Constitution, this Court concluded that the encroachment under all of the circumstances presented did not have "the purpose of emasculating" Article III courts. *Id.* at 3257. By contrast, in cases where citizens pursue enforcement action, the private prosecution authority does emasculate the prosecutorial discretion of the Executive, an "essential attribute" of its constitutionally-created role.

[21] Under the Appointments Clause, the appointment of "inferior officers" may be vested "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const., Art. II, § 2, cl. 2.

during the period since the Act's enactment. But the Executive Branch's prosecutorial discretion is such an "essential attribute" of its constitutional authority to enforce federal law that any unbridled delegation of enforcement responsibility to private individuals by itself results in a significant encroachment. The cases seem in any event to leave no room for finding a provision constitutional if Congress has infringed to any extent on the Executive's powers under Article II of the Constitution. For example, in *Bowsher v. Synar*, even though there was only a theoretical potential for congressional removal of an official appointed by the President, this Court held that that official could not be assigned executive functions. The *Bowsher* ruling shows that the real issue is whether an executive function has been assigned to someone not under the control of the President, not the likely extent of infringement.

Also not germane is an argument that authorizing private Clean Water Act prosecutions for civil penalties is an efficient supplement to executive enforcement. This Court in *Chadha* noted in connection with the one-House veto that, "[i]n purely practical terms, it is obviously easier for action to be taken by one House without submission to the President . . . ." 462 U.S. at 958-959. The Court then pointed out, however, that "it is crystal clear from the records of the [Constitutional] Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency," such as the "desire to define and limit the exercise of the newly created federal power." *Id.*

Moreover, there is no principle of constitutional interpretation that permits the avoidance of enforcing clearly expressed limits on legislative powers simply because it might appear that those limits are unnecessary at a particular time. Krattenmaker, "Article III and Judicial Independence: Why The New Bankruptcy Courts Are Unconstitutional," Geo. L.J. 297, 306 (1981). As the United States Department of Justice has stated:

> Of course it is quite irrelevant to the crucial importance of maintaining the integrity of these foundational [separation of powers] principles that in a particular instance where the principles are ignored, no immediate threat to individual liberty, or even to governmental responsibility, impends. What protects these values, and offers constant reassurance to the people of that protection, is the structure of the Constitution itself; and what threatens these values and the security of the people is any disposition to delapidate that structure. The Framers concerned themselves with potential abuses of power and sought to structure a system that would prevent or contain them in their incipiency.

Brief for the United States at 17, *Bowsher v. Synar*, Nos. 85-1377, 85-1378, 85-1379 (Sup. Ct., filed April 1986).

Accordingly, subjective value judgments as to the utility or intrusiveness of the Act's private prosecution authority for civil penalties are not pertinent to a determination regarding the authority's constitutionality.

4. *Congress' Otherwise Broad Powers Are Circumscribed So That Its Role In Designating Federal Law Enforcers To Act On The Public's Behalf Is Limited To Choosing Among Executive Officers.*

Congress' powers are extensive in various areas related to federal law enforcement to protect the public interest, but the Constitution draws a line short of the Legislature being authorized to displace the Executive's right to appoint the officials who are actually to carry out that enforcement responsibility. *See, e.g., Buckley, supra.* As noted in *Chadha*, the Framers were particularly conscious of the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power . . . ." 462 U.S. at 951.

The Legislature's authority to delegate functions of the federal government is clearest with respect to the granting of quasi-*legislative* rulemaking power to federal agen-

cies, subject only to the constraint that Congress provide sufficiently precise standards to guide the exercise of such authority. *See, e.g., Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 646 (1980); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). Congress also is conditionally empowered to appoint officers to carry out appropriate legislative functions.[22] *Buckley*, 424 U.S. at 127.

Similarly, Congress' right under the Constitution to enact laws in itself necessarily includes authority to provide for the enforcement of such laws. Congress thus can designate one or more Presidential appointees who are to exercise that enforcement authority. Indeed, in *Bowsher v. Synar*, this Court seemed to imply that Congress could have assigned the Comptroller General, an official appointed by the President, the authority to carry out executive functions, if it had not retained a direct role in his removal.

Congress additionally has the authority to regulate the performance of enforcement activities by executive officers. *See, e.g., Kalaris v. Donovan*, 697 F.2d 376, 398 (D.C. Cir.), *cert. denied*, 462 U.S. 1119 (1983). This right, however, is subject to the limitation that such regulation must not interfere with the constitutional duties of the Executive Branch. *Nixon v. Administrator*, 433 U.S. at 444-445.

Finally, as alluded to *supra*, it is clearly established that Congress can by statute vest in private persons the right to bring private actions to redress private in-

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[22] The Executive, like Congress, can delegate its *own* authority to officers of other Branches. In the case of such delegation, the separation of powers mandate is violated only if such vesting of authority in such officers interferes with that other Branch's carrying out of its constitutionally required powers. *See In Re: Application of President's Commission On Organized Crime, Subpoena of Scaduto*, 763 F.2d 1191 (11th Cir. 1985); *In Re: President's Commission on Organized Crime, Subpoena of Scarfo*, 783 F.2d 370 (3d Cir. 1986); *Nixon v. Administrator*, 433 U.S. 425, 433 (1977).

juries.[23] *Davis v. Passman, supra,* elaborates on this authority to create such private right of actions, which are permissible even where there may be significant benefits to the public at large.

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[23] Searching for an analogue to justify private prosecution for civil penalties, respondents might argue that civil penalty suits are only an updated version of the common law *qui tam* actions. This type of suit originated as a legal means for informers in England to obtain a bounty. The Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401-466, permits informers to obtain bounties equivalent to one-half of whatever amounts are recovered. However, courts have uniformly ruled against the initiation of such suits by private individuals, holding that the right to bring them was granted exclusively to the United States Attorney General. *See, e.g., Jacklovich v. Interlake, Inc.,* 458 F.2d 923, 924 (7th Cir. 1972). It has also been held that a private prosecution brought under the Clean Water Act is not a *qui tam* action, because the Act requires that all penalties be paid to the federal Treasury. *Chesapeake Bay Foundation v. Bethlehem Steel Corp.,* 608 F. Supp. 440, 449 (D. Md. 1985). The only instances in which individual citizens have been authorized to initiate actions to recover any amounts payable in part to the federal Treasury appear to be *qui tam* actions outside the environmental area *where potential penalty amounts were very small.* For example, the False Claims Act, 31 U.S.C. § 3729, enacted in 1863, authorizes bounty hunters to bring actions to recover damages as well as a small amount to be forfeited by the defendant, and then keep one-half of any judgment. *See, e.g., United States ex. rel. Marcus v. Hess,* 317 U.S. 537 (1943). However, under this law and all other laws prior to the Clean Water Act, actions for penalties were only authorized to be brought by citizens in situations where the suing party was permitted to retain a share of the limited penalties that were potentially recoverable. Courts, moreover, have been uniformly reluctant to permit private citizens themselves to bring *qui tam* actions (as opposed to permitting the payment of a bounty after federal prosecution). *See,* discussion in *Connecticut Action Now, Inc. v. Roberts Plating Co.,* 457 F.2d 81, 84-85 (2d Cir. 1972). It is significant that the constitutionality of *qui tam* provisions has evidently never been subject to judicial review, certainly not since the holdings in *Buckley, Chadha,* and *Bowsher.* Also of significance is their origination in England under a non-constitutional form of government. *Qui tam* actions have been principally authorized to provide a means for private recoveries, and for that reason, they represent a much more limited infringement on the role of the Executive Branch than actions brought to recover civil

In sum, Congress has broad powers in implementing and delegating its *own* authority, as well as in prescribing constraints on the Executive's carrying out of executive authority. However, delegating executive authority to private citizens conflicts with the Constitution's separation of powers. Congress' role in selecting who may carry out federal enforcement is restricted to the right to choose among executive officials appointed by the President.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Rollins Environmental Services (NJ) Inc. urges that the Court reverse the decision below.

Respectfully submitted,

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penalties payable exclusively to the federal Treasury. Nevertheless, the *qui tam* authorizations *that allow actions for punitive relief to be prosecuted by private bounty hunters* are inconsistent with *Buckley* and related cases and the constitutional mandate of separation of powers.